

Submitted by: Moderator's Committee on Short-Term Rentals. Paula Friedman, chair

Summary

The Moderator's Committee on Short-Term Rentals is submitting three Warrant Articles for the May 2021 Annual Town Meeting. These Articles are much-revised versions of Articles 9, 10, and 11 from the November 2020 Town Meeting. The committee revised the Articles to address questions and concerns raised by Town Meeting members and Brookline residents. The Articles would amend the zoning and general by-laws to allow short-term rentals in all zoning districts. Short-term rentals would be defined as rentals for 27 or fewer consecutive days. Short-term rental units could be rented for up to 90 days per year. Operators would be required to be permanent residents and to own the rented units, but they would not be required to be present while the unit was being rented. The Articles would all require that operators obtain a certificate from the Town, that units be inspected to ensure health and safety, and that operators confirm that rental of the unit is consistent with any relevant condominium association by-laws.

The committee's recommendations are intended to allow the safe operation of short-term rentals in Brookline, to prevent the operation of large numbers of investor-owned professionally managed short-term rental units, and to minimize any negative impact on Brookline residents.

Background

Short-Term Rentals (STRs) are a relatively new concept. Although for many decades some Brookline homeowners may have rented rooms to short-term paying guests, in recent years STRs have become more numerous and more prominent as a result of the convenience of online booking platforms. The best-known of these platforms is Airbnb, although many others exist, including VRBO, booking.com, and Homeaway.

Prior to the Covid-19 pandemic, Brookline's Department of Planning and Community Development estimated that 300–400 STRs were operating in Brookline. Subsequent data provided by the Massachusetts Department of Revenue (DOR)¹ indicates that approximately 265 operators have registered with the DOR to operate a short-term rental in Brookline. Presently, the operation of an STR in Brookline is prohibited because Short-Term Rental is not explicitly listed in the Zoning By-Law's Table of Use Regulations (Table 4.07). Table 4.07 is used by the

¹ On January 25, 2021, the deputy town administrator provided the Moderator's Committee with an XLS file entitled "short term rentals registered in brookline.xls" that was produced by the Department of Revenue.

building commissioner to determine what is allowed. Enforcement is currently handled by the Building Department on a complaint-driven basis and some STRs have been shut down as a result. It is important to note that a lawsuit has been filed challenging how the building commissioner and Zoning Board of Appeals have interpreted the Zoning By-Law as it pertains to Short-Term Rentals in Brookline. If this lawsuit prevails without Brookline having Short-Term Rental regulations in place, Short-Term Rentals will become an as-of-right use in Brookline.

The November 2020 Special Town Meeting

Following a year-long public process conducted by the Planning Department, the Select Board initially placed Articles that included comprehensive Short-Term Rental regulations on the Warrant for the May 2020 Annual Town Meeting. Given the number of Warrant Articles and the difficulty of holding a virtual Town Meeting, these Articles were deferred until the November 2020 Town Meeting Warrant in the form of Warrant Articles 9, 10, and 11. The Articles were substantively revised by the Advisory Committee. The Select Board, Planning Board, and Housing Advisory Board voted to recommend Favorable Action on the motions offered by the Advisory Committee. The November 2020 Town Meeting voted to refer Articles 9, 10, and 11 to a Moderator's Committee for further revision and resubmission to the subsequent Town Meeting. During the Town Meeting debate, several questions were raised, including how enforcement would take place if the short-term rental regulations did not pass, whether the operator of a short-term rental should be required to be present during a rental, and if the definition of a short-term rental as a rental of fewer than 31 days would inadvertently prohibit month-by-month leases, given that some months have fewer than 31 days.

The Moderator's Committee on Short-Term Rentals

After the November 2020 Special Town Meeting voted to refer the subject matter of Articles 9, 10, and 11 to a Moderator's Committee the Moderator appointed a committee and provided the committee with the following charge:

Your objective should be to propose a new warrant article for the 2021 ATM that will seek to establish a reasonable framework for the regulation of short-term rentals in the Town and that will assimilate the best thinking of the Advisory Committee and Planning Department and meet at least the major objections that have been raised regarding these rentals.

The committee adhered to the Moderator's charge, although it found it necessary to propose more than one Warrant Article. Given that the committee had only approximately two months to conduct its work, consisted of six volunteers, and had minimal staff support, it did not engage in a major new data-gathering effort or conduct surveys. Instead, the committee built on the previous efforts of the Department of Planning and Community Development and the various boards and committees that reviewed and revised Articles 9, 10, and 11 for the November 2020 Town Meeting. The committee used the motions offered by the Advisory Committee under those three Articles as a starting point for drafting Warrant Articles for the May 2021 Annual Town Meeting.

The committee met 10 times. It held an organizational meeting on December 10 and held substantive meetings on January 6, 13, 20, and 27, and February 3, 10, 15, 17, and 24. The January 13 meeting was a public hearing.

The committee examined how neighboring communities such as Boston, Cambridge, and Newton regulate short-term rentals. It reviewed data on the number of short-term rental units in Brookline that have been registered with the Department of Revenue. It received input from Town staff, including Deputy Town Administrator Melissa Goff, Building Commissioner Dan Bennett, Transportation Administrator Todd Kirrane, Assistant Director for Regulatory Planning Polly Selkoe, and First Assistant Town Counsel Patty Correa. The Committee expresses its sincere appreciation for the information and advice provided by these Town officials and also for the essential assistance provided by Zoning Coordinator/Planner Monique Baldwin, Kate McGillivray in the Select Board's Office, and Devon Fields, administrative services director in the Select Board's Office.

The committee devoted most of its time to an in-depth line-by-line review of the provisions of the Advisory Committee motions under Articles 9, 10, and 11 from the November 2020 Town Meeting. Its deliberations focused on revising some of those provisions to address potential objections so as to generate Warrant Articles that would be likely to receive widespread support at the May 2021 Annual Town Meeting.

The minutes, recordings, and other documents of the Moderator's Committee are available at: <https://www.brooklinema.gov/1863/Moderators-Committee-on-Short-Term-Renta>

The committee received much public input at its public hearing on Wednesday, January 13, 2021, and in emails from residents, STR operators, and condominium associations. Letters received by the committee can be viewed here: <https://www.brooklinema.gov/DocumentCenter/View/23561/Public-Comment-letters-to-the-Short-Term-Rentals-Committee-Vol-1>

The following is summary of the concerns raised by the public and committee members:

First, there was a category of comments that focused on the impact that STRs have on quality of life. These included issues related to noise, traffic, parking violations, and diminished sense of community. Some letters and emails questioned whether the Town had sufficient enforcement resources to respond to these problems.

Second, residents of condominium associations raised concerns about transient activity in their buildings, increased insurance, maintenance, and shared utility costs (e.g., from frequent washing of sheets and towels) that were borne in part by other owners. This group also urged the committee to propose regulations that would require STR operators to obtain the consent of their condominium associations before the Town issued a certificate of operation.

Third, there was feedback that the proposed regulations were too restrictive, violated the constitutional rights of condominium owners, restricted access by families looking to stay in STRs, and would prevent some residents from earning supplemental income that would help them afford to continue to live in Brookline. Some letters argued that STRs created few problems or disruptions in Brookline's neighborhoods and that any such concerns could be addressed by appropriate regulations.

The Moderator's Committee recognized that short-term rentals have possible advantages and disadvantages. These are generic pros and cons and not necessarily the consequences of the regulations being proposed for Brookline by this committee.

The possible advantages of STRs include:

- *Rental income that enables residents to afford the high cost of living in Brookline, including housing costs and local taxes.* The homeowners who rely on STRs to supplement their income include seniors and other residents who may live on fixed incomes or have experienced reduced wages.
- *Tax revenue for the Town.* Brookline receives a 6% local room occupancy excise tax on short-term rentals and could impose a 3% additional community impact fee on some short-term rentals. In fiscal year 2020 short-term rental revenue was \$434,734, although the Covid-19 pandemic has almost certainly temporarily depressed revenues. The committee acknowledges that imposing fewer restrictions on short-term rentals could substantially increase the amount of revenue that the town receives. Any additional revenue is welcome at a time that the Town faces a fiscal year 2022 budget that is constrained by reduced revenues and increased costs associated with Covid-19, as well as a long-term structural budget deficit.
- *Additional customers for local businesses, particularly restaurants, bars, and some retail stores.* Many of these establishments have been struggling due to the Covid-19 pandemic.

The possible disadvantages of STRS include:

- *Reduction in the quality of life for residents due to noise, congestion, loss of privacy, and a reduced sense of community.*
- *Change in the character of neighborhoods due to the reduction in the number of residential units occupied by permanent residents and the increase in the number of units occupied by short-term visitors.* As more residential units have transient occupants, the sense of community declines. Short-term visitors are also less likely to patronize businesses that cater to long-term residents, including, for example, hardware stores and dry cleaners.
- *Reduction in the available housing stock due to conversion of residential units from long-term occupancy to short-term rentals.* It is difficult to estimate the potential increase in rents that would result from removing residential units from the housing inventory, but a reduction in the number of residential units could increase rents in Brookline. Market forces also might drive long-term rents up to a level comparable to rents for short-term rentals.

The committee considered these advantages and disadvantages and strove to offer a balanced set of recommendations. The committee was particularly concerned about protecting Brookline's inventory of long-term housing from being converted into STRs by investors and professional operators. The committee recognized that Brookline's housing inventory is less likely to be reduced when a homeowner decides to rent one or more unused bedrooms as STR units. The committee thus retained the proposed zoning and general by-law amendments that would make it harder for large numbers of investor-owned STRs to operate in Brookline. These regulations

include the requirement that the unit being rented is owned by the operator and that the unit is the operator's primary residence. These provisions replicate what Boston has done to protect its long-term housing inventory from short-term rental conversion.²

Overall, the committee agreed that the operation of STRs should be safe, monitored, and limited in its negative externalities. The provisions of the three proposed Warrant Articles accomplish these goals by establishing regulations for appropriate certification and oversight of STRs. They also ensure that the operation of STRs will not greatly reduce the availability of long-term housing units—by prohibiting professionally managed STRs, prohibiting units restricted for below market-rate housing from operating as STRs, and allowing only owner-occupied units to operate as STRs.

The Recommendations of the Moderator's Committee

The Moderator's Committee is recommending three Warrant Articles for the May 2021 Annual Town Meeting. These Articles, designated as Articles 14, 15, and 16 in this explanation, roughly correspond to the Articles considered by the November 2020 Special Town Meeting: Article 9 (zoning); Article 10 (regulations); and Article 11 (enforcement). The provisions of each of the former Articles have, however, been revised extensively.

Summary of the Three Warrant Articles

Article 14 – Defines Short-Term Rentals (“not more than 27 consecutive calendar days”) and other related terms, requires that a short-term rental unit must be the primary residence of the operator, specifies that STR operators must own the units they rent out, and adds Short-Term Rentals as an allowed use in all residential and business districts in the Table of Use Regulations of the Zoning By-law.

Article 15 – Creates detailed regulations allowing Short-Term Rentals under a specific set of circumstances and establishes policies and procedures that operators must follow. The following are some of the key provisions:

- Short-term rental operators would be required to apply for and receive a certificate of registration and to show proof that the unit is their primary residence.
- The Select Board would issue regulations for the implementation of the by-law and those regulations could include a cap on the number of certificates of registration issued.
- Inspections by the Health, Building, and Fire Departments would be required before a certification of registration is issued and could be conducted upon renewal or at other times.
- Units cannot be subject to any local, state, or Federal, income eligible or income restricted program that is designated as below market rate housing.
- All accommodations would have to comply with building, fire, and health codes.

² These regulations do not address lodging houses (including those that operate as bed and breakfasts and inns), that offer rooms and units on platforms such as Airbnb and HomeAway. Existing by-law provisions would apply to these establishments.

- Occupancy would be limited to two guests per bedroom, with a cap of four guests in a multi-unit building and six in a single-unit building.
- STR operators would be required to provide a signed certification that the relevant condominium association consents to the use of the unit as a short-term rental.
- The operator also would need to certify that the operation of the STR unit complies with all condominium documents.
- Operators would be required provide 24/7 emergency contact information.
- The Select Board would inform abutters when a certification of registration is issued.
- A list of short-term rental units and violations would be posted on the Town website.
- Certifications of registration would be revoked if three violations are issued in a twelve-month period.
- Commercial uses and rentals for fewer than twenty-four hours would be prohibited.
- There would be a \$300 fine for violations of the by-law.

Article 16 – Establishes the building commissioner, director of health and human services, the fire chief, and the town administrator as enforcement agents.

The by-law amendments in all three Articles would take effect on January 1, 2022.

The following table summarizes the key provisions of the proposed Warrant Articles and how they differ from the provisions of Articles 9, 10, and 11 of the November 2020 Town Meeting.

Regulation	November 2020 Warrant Articles	Amended by STR Committee	Recommendation by Moderator's Committee
STR Zoning Districts	All		All
Operator must own unit and unit must be primary residence	Yes		Yes
Operator Present During Rental	Required	Yes	Not Required
Maximum Rental Duration	31	Yes	27
Number of Guests	2 Rooms 4 Guests	Yes	Multi-Unit Dwelling 2 Bedrooms, 4 Guests. Single-Unit Dwelling 3 Bedrooms, 6 Guests
Certification of Condo Unit Use	Certified by Condo Association	Yes	Certified by Condo Association and Applicant
Certification of Condo Unit Use in Association of 4 Units or Less	Certification by All Owners	Yes	Regulation Eliminated
Inspection of Unit	Required Prior to Initial Issuance of Certificate	Yes	Required Prior to Initial Issuance. Discretion of Building Commissioner at Renewal
Number of Rental Days Per Year	90		90
Commercial Meetings and Uses	Prohibited	Yes	Only Commercial Uses Prohibited.
Select Board May Issue Regulations To Implement By-Law Including Cap on # of STRs including by Zoning District	Yes	Yes	Example of Caps by Zoning District Eliminated
Fine	\$300		\$300

Appeal Process	Defined by Select Board	Yes	A Default Process Has Been Added to the Regulations
Advertisers Must Provide Operator Information to the Town	Required	Yes	Provision Eliminated
Active STR Certificates Published on Town Website	YES		YES
STR Violations Published on Town Website	YES		YES
Abutters within 300' Notified within 15 Days of Issuance of Certificate	YES		YES
Certificate Revoked for 3 Violations in 12 Month Period. Select Board Public Hearing to Reinstate	YES		YES
Regulations enforced by Building Commissioner, Director of Health and Human Services, Fire Chief, Town Administrator and Police	YES		YES

Key Issues and How the Committee Addressed Them

The Moderator's Committee agreed on many aspects of the three Warrant Articles. It recognized, however, that on some questions there were important potential differences of opinion within the committee, within Town Meeting, and within Brookline more generally. The committee's deliberations focused on these issues:

Whether the STR Operator Must Be Present During a Rental

Article 10 from the November 2020 Town Meeting would have required the STR operator to be present during a rental. During the debate, Town Meeting members pointed out that Brookline residents often rent their residences while they are away for a week or two. The committee received similar comments from the public. Reflecting the fact that rentals by temporarily absent owners are common, the committee did not include this requirement in its proposed Warrant Articles.

Whether Renters (Tenants) Could Rent Out Their Units as Short-Term Rentals

The committee decide to retain the requirement that STR operators must be owners of the units they rent out as STRs. Although this may seem unfair to renters who are attempting to supplement their income, the committee felt that allowing renters to be STR operators would make it impossible to distinguish between a renter supplementing their income and a renter who has been installed by an investor to operate an STR. The committee believed that following Boston's approach in this regard would make the most sense.

The Maximum Duration of a Short-Term Rental Stay

Article 9 from the November 2020 Town Meeting set 31 days as the maximum duration of a short-term rental stay. Longer rentals would not be regarded as short-term rentals. Some Town Meeting members pointed out that this provision would classify month-to-month rentals as short-term rentals, because some months have fewer than 31 days. For those months, at least, the

regulations for short-term rentals would apply to longer-term rentals. The committee is therefore proposing that short-term rental stays be defined as stays of 27 days or fewer.

How Many Guests Should be Allowed to Stay in A Short-Term Rental

Article 10 from the November 2020 Town Meeting would have set a limit of two rooms and four guests. Members of the public and STR operators pointed out that this limit was too low, especially for single-family houses, and would make it difficult for some families to stay in STRs. On the other hand, the committee heard concerns that STRs rented by large groups could become “party houses.” The committee attempted to strike a balance by increasing the limits to two guests per room, with a maximum of four guests in a multi-unit dwelling and six in a single-unit dwelling.

Whether All Owners in Condominium Associations with Four or Fewer Units Must Agree to Allow Short-Term Rentals

One of the most controversial provisions of Article 10 of the November 2020 Town Meeting was the requirement that all owners of condominium associations with fewer than four units must consent to the STR use of any unit. This provision reflected concerns that STRs in smaller buildings, particularly those that were built before modern sound-deadening techniques were introduced, are more likely to generate noise or otherwise adversely affect other residents. On the other hand, some commenters raised the point that it would be unfair to give one condominium owner a veto over the operation of an STR unit in their building or association.

After much discussion, the committee decided to delete this provision and to apply the same standard to all condominium associations.

Whether STR Operators Must Obtain the Consent of Their Condominium Associations

This was one of the most difficult issues addressed by the committee. Opinions differ on this question, both among the committee members and in the Brookline community more generally.

The Warrant Article proposed by the committee includes a requirement that condominium owners obtain certification from their condominium association that it consents to STR use. The arguments for this provision include that the condominium association is in the best position to inform the town that the use of the unit is permitted by the association; that the provision keeps the Town out of the decision making of the condominium association; and that Cambridge has been requiring a similar provision of condominium associations in that city for three years.

The arguments against this provision include that the requirement places an unfair burden on the applicant; that the condominium association may delay or hold back consent even though STRs are not prohibited by condominium by-laws; and that the Town is interfering in the decision-making process of the condominium association by requiring association consent. One commenter submitted legal contentions from a law school faculty member and an attorney that the provision may be unconstitutional. (Town Counsel’s office advised that the arguments are untested.).

Whether STR Platforms Such as Airbnb Should be Required to Share Information

Committee members regarded this provision as very difficult to implement, a duplication of information that could be obtained by the Department of Revenue, and a possible invasion of privacy. It was therefore deleted from the proposed Warrant Articles.

The Requirement for Inspections

To ensure safe operation of STRs, the proposed Articles require health, safety, and fire inspections. There has been some doubt about whether the Town will have sufficient staff to conduct these inspections in a timely manner. Members of the committee expressed concern that issuance of a certificate might be delayed while the operator waited weeks or months for the required inspections. The committee decided that inspections should be required before an STR unit obtains a certificate of operation. The word “shall” therefore appears in the Article 15 provisions regarding inspections prior to the issuance of a certificate. The committee decided that inspections need not be required in all cases of STR renewals. The word “may” therefore appears in the Article 15 provisions regarding inspections in connection with renewal of a certificate.

Whether to Allow Commercial Meetings and Uses in STR Units

The committee discussed whether to prohibit commercial meetings, commercial uses, or both in short-term rental units. There was concern that commercial activity could be disruptive in a residential area. The committee also recognized that social events might be hosted by businesses in short-term rentals (e.g., a cocktail party in a house rented by a law firm in connection with a major golf tournament). The committee decided that it would be difficult to prevent commercial meetings, such as a social event or a one-on-one discussion between an author and their agent, in short-term rentals. It concluded that commercial uses, such as using an STR unit as a “pop-up” business could be more disruptive to abutters. Article 15 thus bans commercial uses but does not ban meetings.

Whether to Allow Rentals for Fewer Than Twenty-Four Hours

Article 15 would prohibit STRs for periods of fewer than twenty-four hours. The committee did not want to encourage the use of STRs for business activities associated with the rental of rooms by the hour.

Fines

Article 15 would impose a \$300 fine for violations of the proposed short-term rental by-law. The committee considered options for allowing warnings to be issued for some first offenses, but, after receiving input from Town Counsel, decided that it would be unwise to use language (e.g., “may be imposed”) that would grant excessive discretion to enforcing authorities.

Issues and Choices for the May 2021 Annual Town Meeting

By a vote of 5–1, the Moderator’s Committee decided to place the three Articles on the Warrant for the May 2021 Annual Town Meeting.

The Committee took into account the legal requirement that the type of amendment to the zoning by-law that is proposed in the first Article must be adopted by a two-thirds vote of Town Meeting. (As a result of recent changes in Massachusetts state law, some types of zoning amendments now require only a simple majority vote in Town Meeting. The zoning amendments proposed by the Moderator's Committee are not in this category.)

Members of the Moderator's Committee were aware that it might be difficult to achieve a two-thirds majority in favor of any Warrant Article that included zoning amendments regarding short-term rentals. The committee agreed that it would be better to have clear zoning and general by-laws regarding short-term rentals than to have no by-laws and potential uncertainty. The Articles placed on the Warrant by the committee thus incorporate a number of compromises and were drafted with the objective of winning support from a large majority of Town Meeting.

The committee also took into account the possibility that the Massachusetts attorney general could rule that some provisions of these Warrant Articles are invalid because they are inconsistent with state law. The committee also recognized that some provisions could be challenged by lawsuits filed against the Town of Brookline and struck down by court decisions.

Because the law regarding short-term rentals is new and evolving, it is difficult to predict which, if any, provisions of the by-law amendments in the Warrant Articles would be vulnerable to successful legal challenges or adverse court rulings. To address this concern, two of the proposed Warrant Articles contain severability clauses that state that the remaining portions of the by-law amendments would remain in effect even if some portions were found to be invalid by the attorney general or a court of competent jurisdiction. Note, however, that these severability clauses could create a situation in which one or more important provisions were removed from the overall set of regulations voted by Town Meeting, leaving the other provisions in effect.

The Moderator's Committee was aware of how the language of a Warrant Article determines the scope of the Article and the range of possible amendments that would be allowed by the Moderator. The committee consulted with Moderator Gadsby and attempted to draft Warrant Articles for which several important potential amendments would be within the scope of the Article. In particular, the committee tried to ensure that Town Meeting could consider various amendments that would change any requirement that an STR operator obtain the approval of the relevant condominium association.

These Articles allow and regulate a new use in Brookline. There is no guarantee that the past approach to determining which amendments will be allowed will be followed by a new Moderator. Attempts to amend the Warrant Articles will raise important questions about which amendments are within the scope of the article. The new Moderator elected to serve at the May 2021 Annual Town Meeting may or may not allow amendments and motions depending on the Moderator's judgment of what is within the scope of the Article.

If Town Meeting members feel that the Articles are too permissive, they could move amendments that would, for example, prohibit STRs in certain zoning districts, reduce the maximum days per year that a unit can be rented as an STR, or defer the January 1, 2022 effective date of the by-law amendments, as the Moderator may deem within the scope of the original Article.

If Town Meeting members feel that the Articles are unnecessarily restrictive, that these restrictions will result in the inability of homeowners to continue their practice of earning a sufficient income from their units, and that the negative externalities of STRs need not be severe, they could move amendments that would delete requirements that STR operators demonstrate that short-term rentals are not prohibited by the relevant condominium association by-laws. To reduce the risk that issuance of a certificate to operate an STR might be delayed because an inspection could not be carried out promptly, an amendment might relax the inspection requirements by substituting “may” for “shall” in the by-law provisions that call for inspections of STRs.

ARTICLE 15

Submitted by: Moderator’s Committee on Short-Term Rentals. Paula Friedman, chair

Please see description under Article 14.

ARTICLE 16

Submitted by: Moderator’s Committee on Short-Term Rentals. Paula Friedman, chair

Please see description under Article 14.

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